Tan Tien Kok v Medical Specialist Centre (JB) Sdn Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO 12-29-92
MOHD GHAZALI JC
29 JULY 1994

Companies and Corporations *— Resolutions — Matters affecting shareholders — Resolution passed at meeting of board of directors — Whether general meeting required if directors and shareholders are same persons — Companies Act 1965*

Companies and Corporations *— Members — Liability — Whether members could be made to pay surcharge to meet overheads of company — Whether surcharge could be ratified by amendment to articles of association — Whether surcharge amounted to a loan from the members to the company — Companies Act 1965*

Companies and Corporations *— Ultra vires — Surcharge — Imposed on members to meet company's overheads — Whether company could claim for outstanding payments — Companies Act 1965*

The respondent was a private limited company incorporated under the Companies Act 1965 ('the Act') to establish and run a medical specialist centre in Johor Bahru ('the centre'). It had eight directors, who were the only shareholders. The appellant was the only director and shareholder holding two blocks of shares of 500,000 each, the policy of the company being that each shareholder was required to hold at least one block of shares.

As the monthly service charges and paid-up capital of the respondent were insufficient to meet its overheads, the board of directors, at a meeting held on 12 January 1990, decided to implement the appellant's suggestion that all shareholders should pay a monthly surcharge of RM2,000 to the respondent until further notice. The appellant later requested for a review of his surcharge payments since he had had to pay twice the amount of surcharge as he held two blocks of shares. No agreement being reached on this matter, the appellant subsequently withdrew his practice from the medical centre in March 1991. The respondent later formalized the imposition of the surcharge by an amendment to its articles of association.

The appellant filed an action in the sessions court against the respondent claiming the return of RM50,000 being the surcharge paid by him from December 1989 to September 1990. He alleged that the sum was a loan to the respondent. The respondent denied that the surcharge payments were loans and claimed that they were subsidies to meet the costs of running the centre. The respondent also averred that the appellant was estopped from denying that the surcharge was non-refundable and counterclaimed for RM72,000 in outstanding payments from August 1990 to May 1991. The sessions court judge dismissed their claims and both parties appealed. The key issue was whether the surcharge payments were meant to be

loans from the shareholders to the respondent or were non-recoverable contributions for the maintenance of the centre. A

Held, allowing the appellant's appeal and dismissing the respondent's cross-appeal:

(1) The meeting of 12 January 1990 was a meeting of the board of directors and not a general meeting of the respondent. Although its directors and shareholders were the same persons, the Act provides that in matters affecting the shareholders, a company must hold a general meeting to pass the resolution. Therefore, the resolution, if at all it was one, that all the shareholders should pay a surcharge could not bind the shareholders. B C

(2) As the respondent was a private company limited by shares, the liability of its members was limited to the amount unpaid on their shares. The respondent's debts were its obligation alone and could not be enforced against its members. Therefore, the purported ratification of the surcharge by amending the articles of association was contrary to the Act. D

(3) Although art 47 of the respondent's articles allowed the directors to borrow money for the purpose of the company, the directors could not do so by imposing a surcharge on the shareholders. The surcharge payments were tantamount to loans given to the respondent and were now debts of the respondent which were repayable on demand. The respondent was therefore under a legal obligation to return to the shareholders the sums of money received as the surcharge. E

(4) The imposition of the surcharge was ultra vires since it made the shareholders personally liable for the respondent's debts. The admission of an estoppel against the appellant would allow the respondent to do an ultra vires act. Thus the respondent could not succeed in its counterclaim for non-payment of the surcharge. F

[Bahasa Malaysia summary G

Responden adalah sebuah syarikat sendirian berhad yang ditubuhkan di bawah Akta Syarikat 1965 ('Akta itu') untuk mendirikan dan mengendalikan sebuah pusat perubatan pakar di Johor Bahru ('pusat itu'). Ia mempunyai lapan orang pengarah yang merupakan pemegang-pemegang sahamnya. Perayu merupakan pengarah dan pemegang saham tunggal yang memiliki dua blok saham yang terdiri daripada 50,000 saham tiap-tiap satu. Polisi syarikat itu memerlukan setiap pemegang saham memiliki sekurang-kurangnya satu blok saham. H

Oleh kerana caj perkhidmatan bulanan dan modal terbayar responden tidak mencukupi untuk menampung overhednya, lembaga pengarah, di satu mesyuarat yang diadakan pada 12 Januari 1990, telah memutuskan untuk melaksanakan saranan perayu bahawa kesemua pemegang saham harus membayar bayaran tambahan bulanan sebanyak RM2,000 kepada responden sehingga satu masa I

kelak. Perayu kemudiannya telah memohon satu kajian semula tentang bayaran tambahan bulanannya kerana beliau telah dikenakan dua kali jumlah bayaran tambahan itu akibat pemilikan dua blok saham olehnya. Oleh kerana persetujuan tidak dapat dicapai tentang perkara ini, perayu kemudiannya telah menarik diri daripada pusat itu pada Mac 1991. Responden selepas itu telah memformalkan pembayaran bayaran tambahan bulanan melalui satu pindaan kepada perkara-perkara persatuannya.

Perayu telah memfailkan tindakan di mahkamah sesyen terhadap responden untuk menuntut pembayaran balik RM50,000 yang merupakan bayaran tambahan yang telah dibuat olehnya dari Disember 1989 hingga September 1990. Beliau mendakwa bahawa jumlah itu adalah satu pinjaman kepada reponden. Responden telah menafikan bahawa bayaran tambahan itu adalah pinjaman dan menegaskan bahawa bayaran-bayaran itu adalah subsidi untuk menampung kos pengendalian pusat itu. Responden juga berhujah bahawa perayu diestop daripada menafikan bahawa bayaran tambahan itu tidak boleh dikembalikan dan seterusnya menuntut balas jumlah RM72,000 yang merupakan bayaran tertunggak dari Ogos 1990 hingga Mei 1991. Hakim mahkamah sesyen telah menolak tuntutan mereka dan kedua-dua pihak telah membuat rayuan. Isu penting yang timbul ialah sama ada bayaran tambahan itu adalah pinjaman daripada pemegang saham kepada responden atau merupakan sumbangan yang tidak boleh dituntut balik untuk pengendalian pusat itu.

Diputuskan, membenarkan rayuan perayu dan menolak rayuan balas responden:

(1) Mesyuarat pada 12 Januari 1990 itu adalah suatu mesyuarat lembaga pengarah dan bukannya satu mesyuarat agung responden. Walaupun pengarah dan pemegang saham adalah orang-orang yang sama, namun Akta itu memperuntukkan bahawa dalam perkara yang melibatkan pemegang saham, sesebuah syarikat mesti mengadakan satu mesyuarat agung untuk meluluskan resolusi tersebut. Oleh itu, resolusi itu, jikapun ianya merupakan suatu resolusi, bahawa kesemua pemegang saham harus membayar bayaran tambahan tidak boleh mengikat pemegang-pemegang saham.

(2) Oleh kerana responden adalah sebuah syarikat sendirian yang dihadkan oleh saham, tanggungan ahli-ahlinya dihadkan kepada jumlah yang belum dibayar atas saham-saham mereka. Hutang responden adalah kewajipannya sendiri dan ianya tidak boleh dikuatkuasakan terhadap ahli-ahlinya. Lantaran itu, ratifikasi yang kononnya dibuat berkaitan dengan bayaran tambahan itu melalui pindaan kepada perkara-perkara persatuan adalah bertentangan dengan Akta itu.

(3) Walaupun fasal 47 perkara-perkara persatuan responden membenarkan pengarah-pengarahnya meminjam wang untuk tujuan syarikat itu, pengarah-pengarah tidak boleh berbuat

demikian dengan mengenakan bayaran tambahan ke atas pemegang-pemegang sahamnya. Bayaran tambahan itu seakan-akan pinjaman yang diberikan kepada responden dan sekarang menjadi hutang responden yang harus dibayar apabila dituntut. Oleh kerana itu, responden berada di bawah satu kewajipan di sisi undang-undang untuk memulangkan kepada pemegang sahamnya jumlah wang yang telah diterima sebagai bayaran tambahan.

(4) Pengenaan bayaran tambahan itu adalah ultra vires kerana ianya membuat pemegang-pemegang saham bertanggungan secara peribadi untuk hutang responden. Jika estopel dibenarkan terhadap perayu, ianya akan membenarkan responden melakukan suatu tindakan yang ultra vires. Oleh itu, responden tidak boleh berjaya di dalam tuntutan balasnya untuk bayaran tambahan yang belum dibayar.]

Notes

For cases on resolutions, see 3 *Mallal's Digest* (4th Ed) para 155; [1993] Mallal's Digest 354, 372.

For cases on ultra vires, see 3 *Mallal's Digest* (4th Ed) paras 230–232; [1991] Mallal's Digest 593; [1992] Mallal's Digest 468–469.

Cases referred to

Court Grange Silver-Lead Mining Co, ex p Sedgwick, Re (1856) 2 Jur NS 949 (folld)

Kepong Prospecting Ltd & Ors v Schmidt [1968] 1 MLJ 170 (distd)

Maritime Electric Co Ltd v General Dairies Ltd [1937] AC 610 (folld)

Oversea Chinese Banking Corp Ltd v Woo Hing Brothers (M) Sdn Bhd [1992] 2 MLJ 86 (distd)

Salomon v Salomon & Co Ltd [1897] AC 22 (folld)

Seldon v Davidson [1968] 2 All ER 755; [1968] 1 WLR 1083 (refd)

Legislation referred to

Companies Act 1965 ss 4(1), 18(1)(d), 154(1)(b), 214(1)(d)

Chew Whye Jee (*Chew, Ong and Partners*) for the appellant.

Gana Muthusamy (*SL Song* with him) (*SK Song*) for the respondent.

Mohd Ghazali JC: The respondent, a private limited company, was incorporated under the Companies Act 1965 on 27 August 1988. The main object of the respondent is to establish and run in Johor Bahru a medical specialist centre and to equip and to provide it with every facility for persons requiring medical, surgical, dental, nursing and/or such other care and attention as can be obtained in a medical specialist centre. The medical centre commenced its operations on 31 August 1989. The appellant, a doctor, was a director and a shareholder of the respondent.

The authorized capital of the respondent is RM500,000 divided into 500,000 shares of RM1 each. The respondent has eight directors and all

of them are the only shareholders. The eight directors cum shareholders are medically qualified doctors and are specialists in their respective fields. It seems to be a policy of the respondent that only medically qualified doctors are allowed to be shareholders and each shareholder is required to hold at least a block of shares amounting to 50,000 shares. The appellant is the only director and shareholder holding two blocks of shares.

For the purpose of running the medical centre, the respondent rented a building called Wisma Maria, located in Jalan Ngee Heng, Johor Bahru. Each director cum shareholder entered into an agreement with the respondent for a licence to use a lot in the said premises for the purpose of running his own clinic and was required to make monthly payments to the respondent for the license, calculated according to the size of the area of floor space required for his clinic. The appellant entered into such an agreement with the respondent on 11 September 1989. Other medical doctors who were non-shareholders were also allowed to enter into similar agreements with the respondent if they wished to run their clinics within the respondent's premises.

The paid-up capital of the respondent was utilized to renovate the said premises and for leasing of equipment. Each director cum shareholder kept his professional charges for services rendered within his own clinic and was only required to pay to the respondent what had been agreed upon under the said licence. They were not required to pay any other expenses towards the running of the medical centre. This arrangement however resulted in the respondent running the medical centre at a loss. According to the evidence adduced at the trial in the sessions court, every director cum shareholder was making money but this was not the case for the respondent.

As the paid-up capital was found to be insufficient to meet the overheads of running the medical centre, the board of directors, at a meeting held on 12 January 1990 decided that all shareholders pay a monthly surcharge of RM2,000 to the respondent until further notice. It was the appellant who suggested that each shareholder pay a monthly 'surcharge' and this was agreed to by the board. According to the evidence, the intention of collecting the surcharge was for the purpose of meeting the monthly overheads of running the medical centre.

However at a meeting of the board held on 9 March 1990, the appellant requested for a review of his surcharge payments since he had been asked to pay twice the amount of surcharge as he is holding two blocks of shares. He felt that as a single practitioner he should only pay a single surcharge like the rest of the shareholders. The board did not however make any decision on the appellant's request for a review. At another meeting of the board held on 13 April 1990 the appellant once again put forward his request for a review but it was turned down by the board.

At another board meeting held on 17 May 1990, the appellant informed the board that the present practice of paying the surcharge was not right and suggested that the surcharge payments be classified as capital investment. He also suggested that the directors should meet with the

company auditors to clarify the matter. At the trial, the respondent's auditor, DW6, gave evidence that the surcharge were contributions from the shareholders to the respondent and were never meant to be loans to the respondent. He also stated that the annual report of the respondent for 1990/1991 did not reflect that these amounts were loans. According to him the word 'surcharge' means 'extra additional contribution towards overhead costs of a company'. He stated that he had advised the respondent to treat the surcharge as income and that such payments did not tantamount to an increase in capital. He also confirmed that the surcharge payments were utilized to finance the running of the medical centre.

As a result of the above events the respondent issued a circular (exh D9) dated 4 September 1990 and circulated it to all the shareholders. The circular read as follows:

> Please indicate by signing below the option you agree upon regarding the surcharge payment to Medical Specialist Centre.
>
> Option 1: Surcharge payment to the Centre as subsidy.
>
> Option 2: Surcharge payment to the Centre as capital investment.

Six of the directors chose the first option and one chose the second option whereas the appellant returned the circular without choosing any option after indicating that he was not interested. He was obviously still not happy at having to pay a double surcharge and subsequently withdrew his practice from the medical centre in March 1991.

The appellant subsequently filed an action in the Sessions Court, Johor Bahru against the respondent claiming the return of RM50,000 which he claimed was the total amount of surcharge he paid to the respondent from December 1989 to September 1990. In his statement of claim dated 19 March 1991, he claimed that the sum of RM50,000 were loans to the respondent free of interest from time to time at the respondent's request and that such sum was to be returned on demand.

In its statement of defence, the respondent denied that the surcharge payments were loans and claimed that they were subsidies to meet the costs of running the medical centre and were charges imposed for the use of its facilities by the appellant. The respondent also made a counterclaim against the appellant for the sum of RM72,000 which was the surcharge outstanding and due from the appellant for the months of August 1990 to May 1991. At the end of the trial, the sessions court judge dismissed the appellant's claim as he found that there was no resolution to show that the surcharge payments were meant to be loans from the shareholders to the respondent. He also found that the surcharge payments received by the respondent were not reflected as loans by the auditor in the accounts of the respondent. The session court judge also dismissed the counterclaim against the appellant for outstanding sums due and not paid under the surcharge. He made a finding that since the respondent is merely a beneficiary of the surcharge which was the result of an agreement amongst the shareholders it was not entitled to claim as it was not a party to the agreement. He further held that at the end of the day the surcharge would

A benefit all the shareholders including the appellant and as such was not recoverable by either party to the action. Both parties have appealed.

It was never disputed by either party that the suggestion of paying surcharge was first mooted by the appellant at a meeting of the board and that the board agreed to the suggestion. Neither was it disputed that the B appellant was prepared to pay and did make payments totalling RM50,000. However he was not too happy when he was required to pay a double surcharge based upon his shareholdings. The minutes of several meetings of the board which were introduced at the trial did not actually give details on the concept of the surcharge and its consequences. The appellant only claimed they were loans when he withdrew his practice from the medical C centre. Five directors and the company auditor who gave evidence for the respondent stated that the surcharge payments were never intended to be loans to the respondent as they were all practising within the respondent's premises. They claimed that the surcharge were contributions for maintenance of the medical centre.

D Thus the point of dispute is whether the surcharge payments were meant to be loans from the shareholders to the respondent and thus recoverable or meant to be non-recoverable contributions from the shareholders for maintenance of the medical centre.

The sessions court judge held that since the respondent was only a E beneficiary and not a party to the agreement amongst the shareholders, it was not entitled to claim the outstanding surcharge from the appellant. Within this context, he referred to the case of *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170 which was followed with approval in the case of *Oversea Chinese Banking Corp Ltd v Woo Hing Brothers (M) Sdn Bhd* [1992] 2 MLJ 86. I have read both cases and I cannot see their relevance F within the context of his grounds. The only common principle of law dealt with in both the cases cited is that in order to succeed on a claim on a contract, a plaintiff must prove consideration, and a claim on contract cannot succeed if you are not a party to the contract. With respect, as will be discussed later, I am of the view that the sessions court judge had based G his decision on irrelevant principles of law which are not applicable in this case.

At the hearing of this appeal, counsel for the appellant argued that the appellant had informed the board at its meeting held on 17 May 1990 that the practice of paying the surcharge was not proper and that the payments should be classified as capital investment. Counsel argued that H under the Companies Act 1965 ('the Act') there is no such concept as a 'surcharge' and that the respondent had no right to collect it. Furthermore the intention of the parties was that the money collected was to sustain the respondent over the lean period. To support his argument that the surcharge was actually loans to the respondent company he referred to the case of I *Seldon v Davidson* [1968] 2 All ER 755; [1968] 1 WLR 1083. In that case, the plaintiff paid to the defendant, who was then her chauffeur-handyman, certain sums of money in the form of two cheques, to buy himself a house, which he did. Subsequently the plaintiff demanded repayment of the money and when the defendant refused to pay, brought an action against

him. In his defence, the defendant admitted receipt of the money but alleged it was a gift. The appellate court allowed the claim and Wilmer LJ said ([1968] 2 All ER 755 at p 757; [1968] 1 WLR 1083 at p 1088):

> No such considerations arise in the present case; indeed, they are clearly ruled out because we have from the defendant in this case a clear admission of the payment of the money, and no suggestion that it was paid in settlement of an existing debt, or that it was given in return for cash, or anything of that sort. In the absence of any such circumstances, money paid by the plaintiff in circumstances such as these is prima facie repayable on demand. If the defendant seeks to evade repayment of the money which was paid to him, it seems to me that the learned judge was right in placing the onus on him to prove the facts which he alleges show that the money was not repayable.

Counsel for the appellant then referred to art 140 of the articles of association (at p 143 of the record of appeal) of the respondent company which provides:

> The directors ... shall be indemnified out of the assets of the company from and against all ... losses damages and expenses which they ... may incur or sustain by reason of any act done omitted in or about the execution of their duty in their respective offices ...

He argued that since the surcharge payments were collected from the appellant to pay the maintenance expenses for the running of the medical centre, the appellant, as a director, was entitled to be indemnified by virtue of the said article. Counsel then referred to several authorities which held that any expenditure made by a shareholder or director of a company, for the benefit of that company, is recoverable. I only need to refer to one, namely, *Re Court Grange Silver-Lead Mining Co, ex p Sedgwick* (1856) Jur NS 949 where the facts are as follows: the manager and principle director of a mining company, under the authority of a minute at a general meeting, provided the money for carrying on a mine of the company, and other purposes of the company. He had procured the money for the above purposes on his own acceptances, some of which he had also given to creditors of the company, who had threatened to sue the company, and were now threatening him upon his separate acceptances. It was held by the court that such acceptances being bona fide given, and the proceeds applied for the purposes of the company, entitled the director to sue for contribution.

In reply, counsel for the respondent argued that the surcharge payments were never meant to be loans but were treated as income of the respondent. Furthermore the minutes do not show that they were to be treated as loans. Counsel added that at a general meeting of the company held on 6 April 1991 the shareholders had ratified the payment of the surcharge when it approved an amendment to its articles of association, namely, by introducing art 106A(c) which states all medical practitioners who are shareholders and practice at the medical centre shall contribute to the running of the centre by payment of surcharges to the company as determined by the board and in proportion to the shares held in the company.

A Counsel for the respondent further argued that as it was the appellant himself who mooted the payment of the surcharge and he had never made any complaints about it, except for having to pay a double surcharge, he is estopped from claiming that the surcharge payments were loans.

It is my finding that the fateful meeting held on 12 January 1990 was
B a meeting of the board of directors of the respondent company and not a general meeting of the company. This fact is confirmed by the minutes of the meeting, exh D3 (at p 96 of the record of appeal) which is entitled 'Directors' meeting'. Since it was a decision of the board that the shareholders pay a surcharge, can such a decision be binding on the shareholders although they were the same set of persons?

C It was established in *Salomon v Salomon & Co Ltd* [1897] AC 22 that a registered company is a legal person separate from its members. A company, of course, can only act through human agents, and those who manage its business are called directors. But the directors are only agents of the company. A company must have members, otherwise it would never
D exist at all, and in the case of a company with a share capital these members are called shareholders. According to its certificate of incorporation (at p 126 of the record of appeal) the respondent is a private company limited by shares. Although its directors and shareholders are the same set of persons, the Act provides that in matters affecting the shareholders, a company must hold a general meeting to pass the necessary resolution.
E Section 154(1)(b) of the Act provides that a copy of the resolution or an agreement which effectively binds any class of shareholders whether agreed to by all the members of the class or not shall be lodged with the Registrar of Companies within one month after the passing of the resolution. In the instant case the resolution to impose surcharge on the shareholders, if at
F all it was one, made at the meeting of the board held on 12 January 1990, cannot at all be deemed to be a resolution of the respondent company at a general meeting, although the directors and the shareholders are the same set of persons, since under the Act certain statutory formalities must be complied with before a company can hold a general meeting. Furthermore the respondent company had only formalized the imposition
G of the surcharge when they ratified it at a meeting of the company held on 6 April 1991, that is, when they approved an amendment to the articles of association by the introduction of art 106A (at p 128 of the record of appeal). It is my finding that the resolution of the meeting of the board of directors held on 12 January 1990 that all shareholders have to pay
H surcharge cannot at all bind the shareholders. It has no legal effect and cannot be enforced against the shareholders even though they were the same set of persons.

Even if there had been a general meeting of the respondent company on 12 January 1990, instead of a board meeting, and the majority of the
I shareholders had passed a resolution that every shareholder had to pay a surcharge, it is my finding that such a resolution cannot be valid pursuant to the provisions of the Act where the conception of a company is that it is a person separate and distinct from the other persons who are its members and directors — this is the fundamental principle of company

law. The shareholders' position with regard to a company itself and to their fellow shareholders is regulated by the Act and by its memorandum and articles of association. The respondent company is a 'company limited by shares' which is defined in s 4(1) of the Act as 'a company formed on the principle of having the liability of its members limited by the memorandum to the amount (if any) unpaid on the shares respectively held by them'. Section 18(1)(d) of the Act provides that the memorandum of every company shall, amongst other requirements, state that if the company is a company limited by shares, the liability of its members is limited. Consequently s 214(1)(d) provides that on a winding up, in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member. Thus the liability of a member of a company limited by shares to contribute to the company's assets (for the purpose of enabling its debts to be paid) is limited to the amount, if any, unpaid on his shares. This means that the company's debts are the obligations of the company alone and cannot be enforced against the members, however many shares they may own. It is obvious that the directors, as agents of the respondent company, had contravened the provisions of the Act and the principles of law referred to above when they resolved that the shareholders pay the surcharge to the respondent. Accordingly, it is my view that the new art 106A referred to above would, on the surface of it, be contrary to the provisions of the Act.

The shares issued by a company belong to the respective shareholders who have bought them. The general rule is that a shareholder cannot get back his money from the company so long as the company is in existence because his position is not that of a person who has lent money to the company or has deposited his money as with a bank — it is that of the owner of property, namely, his shares can only be turned into money if a buyer can be found to pay for them. In any event, it is the general policy of the Act to see that the issued share capital is maintained intact, except for losses in the way of business, so that it may be available to satisfy the company's debts. Article 47 of the respondent's articles of association (at p 137 of the record of appeal) allows the directors at their discretion to raise or borrow any sums or sums of money for the purpose of the company. This means that the directors can resort to raising money for the company's purposes but they definitely cannot go about it by imposing the surcharge on the shareholders according to the amount of shares owned by them. This is not what is contemplated by the said art 47.

I agree with counsel for the appellant that the term 'surcharge' does not appear at all in the Act. According to *Osborn's Concise Law Dictionary* (7th Ed) a 'surcharge' means 'In taking or auditing accounts, to surcharge is to disallow an unauthorized item of expenditure, and make the accounting party liable to it personally'. According to *Jowitt's Dictionary of English Law* (2nd Ed) a 'surcharge' is 'an overcharge of what is just and right'. It is not disputed that the surcharge was utilized to pay for the costs of running the medical centre as the directors had realized that the paid-up capital of the respondent company was insufficient but to make the shareholders be

liable to it personally would be ultra vires as the Act itself provides, as stated earlier, that a company limited by shares is a company formed on the principle of having the liability of its members limited to the amount (if any) unpaid on the shares respectively held by them. According to DW1, one of the directors, the surcharge received was utilized to pay the salaries of the staff, for payments toward the leasing of equipment and other facilities. These are definitely obligations of the respondent and the directors cannot enforce it against the shareholders.

For the above reasons, it is my finding that the surcharge payments imposed upon the shareholders by the board of directors on 12 January 1990 are void and not enforceable against the shareholders. The surcharge imposed is contrary to the concept of a company limited by shares as defined in the Act and cannot at all be binding upon the shareholders. Consequently, it is my finding that the respondent is under a legal obligation to return to the shareholders the sums of money received as the surcharge. The surcharge payments were tantamount to loans given to the respondent and these sums are now debts of the respondent which are repayable on demand.

With regard to the argument of counsel for the respondent that the appellant is estopped from denying that the monthly surcharge were non-refundable payments, I cannot see any merit whatsoever in his contention. The respondent company, as discussed earlier, was incorporated under the Act as a company limited by shares. The Act provides that the liability of its members/shareholders are limited to the amount unpaid on the shares held by them. The imposition of a surcharge is ultra vires since it has resulted in making the shareholders to be liable personally for the debts of the respondent company, over and above what they have fully paid for their shares. The admission of an estoppel would nullify the statutory provision as to what constitutes a company limited by shares and allow the respondent company to do an ultra vires act. On this issue it was held in *Maritime Electric Co Ltd v General Dairies Ltd* [1937] AC 610 [at p 620]:

> ... the court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision.

Accordingly, it is also my finding that the respondent company cannot succeed on its counterclaim against the appellant for non-payment of surcharge for the same reasons.

The appellant's claim as a shareholder for the return of the surcharge should succeed. As such I reverse the decision of the sessions court judge and allow the appeal of the appellant with costs here and below. The appeal by the respondent against the dismissal of its counterclaim is hereby dismissed with costs.

Order accordingly.

Reported by Kevin Ooi